Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
1998 Biennial Regulatory Review --	)	MM Docket No. 98-43
Streamlining of Mass Media Applications,	)	
Rules and Processes	)	

TO: The Commission

PETITION FOR RECONSIDERATION

Browne Mountain Television ("Browne"), by counsel and pursuant to Section 1.106 of the Commission's rules, hereby respectfully petitions the Commission to reconsider certain aspects of the rules and policies which it adopted in the Report and Order ("R&O"), FCC 98-281, released November 25, 1998, in the above-identified proceeding. Public notice of this R&O was published in the Federal Register on December 18, 1998, at 63 Fed.Reg. 70040.

Browne is the permittee of unbuilt Low Power Television station K34DU, Spokane, Washington. The original construction permit for K34DU was issued on June 1, 1992. During the initial construction period, problems arose concerning the suitability of the tower at the authorized antenna site. Browne was unable to use the tower at the site and was unable to move to another site for a number of years because of the restrictions on the filing of major change applications by LPTV stations. Such applications may be filed only during specified filing windows. Eventually, the Commission opened such a filing window in April, 1996, and Browne submitted a modification application at that time. This modification application was granted

later that year. However, before Browne could complete construction of the station, a construction permit was granted to another applicant for a full-power station at Spokane on Channel 34. Thus K34DU was displaced by a full-power station. Browne has filed a major modification application to propose an alternate channel under the special procedures adopted by the Commission for the benefit of displaced LPTV stations. That application remains pending the present time.

In the Notice of Proposed Rule Making ("NPRM"), 13 F.C.C.Rcd. 11349 (1998), in this proceeding, the Commission proposed a variety of amendments to its rules characterized as a "streamlining"of the processes governing broadcast applications and construction permits. Among these, was a series of procedural and substantive changes concerning the length of the life of the broadcast construction permit. In the NPRM, at ¶59 *et seq.*, the Commission proposed to establish the length for all construction permits at three years. No extensions of permits would be contemplated. Under certain specified circumstances where the permittee encountered encumbrances which would legitimately preclude construction, the running of that three-year life of the permit could be tolled upon proper notification to the Commission. Where the permit expired without the completion of construction of the station and the filing of a license application, the Commission stated its preference for the automatic forfeiture of the permit.

At ¶68 of the NPRM, the Commission described how it proposed to apply the new rule to permittees with existing construction permits. The new rule would cover all permits in their initial construction periods. However, the Commission explicitly stated that

> [I]t would be administratively unworkable to apply the proposed rules to construction permits that are already beyond their initial construction periods (whether through extension, assignment, transfer of control, or modification). Because many of these

> permits have already been afforded a construction period close to (or in many instances, in excess of) the three-year term proposed in this Notice, we propose to continue to apply the rules as they exist today to permits outside their initial periods. We invite comment on the tentative conclusion that it is more appropriate to continue to apply our current rules to construction permits that are beyond their initial periods.

Notwithstanding the Commission's explicit statement about its intentions for dealing with existing construction permits already beyond their initial construction period, the agency adopted precisely the opposite approach in the R&O. At ¶89, the Commission indicated that the new regime would apply to all existing permits, including those with extensions. Any permittee currently authorized to construct under an extension of its permit may request the further extension of the permit under the new rule for a period extending until three years from the issue date of its original permit. If the permittee makes an appropriate showing, the calculations to determine the ultimate expiration date are to include consideration of permissible tolling for encumbrances incurred anytime during the history of the permit. However, the Commission stated in stark terms that

> No additional time will be granted when the permittee has had, in all, at least three unencumbered years to construct. The construction permit will be subject to automatic forfeiture at the expiration of the last extension.

This ruling was announced without explanation or rationale. Such a result is surprising given that the Commission had previously said in the NPRM in this proceeding that applying the new rule to permits which had already been extended under the old rule "would be administratively unworkable." The Commission had indicated that its "tentative conclusion" was to continue the existing regulations for permits which had already been extended, and it had solicited public comment on that tentative conclusion. Now, in the final R&O, the Commission has adopted a rule completely at odds with the proposal made in the NPRM. No information is

given with respect to the existence or contents of comments received concerning this issue. Neither is there any explanation to support whatever *sua sponte* internal reasoning the Commission may have conducted on this topic. Without notice or explanation, the Commission simply reversed its prior "tentative conclusion."

The Commission's adoption of its new three-year construction permit regimen with respect to permits which had previously been extended under the old rule constitutes a violation of the advance notice and comment requirements of the Administrative Procedure Act ("APA"), 5 United States Code § 553. The APA requires publication of a general notice about a proposed rulemaking which includes the terms and substance of the proposed rule, or a description of the subjects and issues involved. The Commission did not offer any warning that it might apply the three-year rule to existing extended permits. In fact, the Commission expressly stated the opposite – that it had concluded that applying the new rule to the older permits would be "administratively unworkable."

That the FCC is obliged to comply with the advance notice provisions of the APA in its rulemaking proceedings is a well-established and judicially confirmed principle. The APA requires an administrative agency to provide notice of a proposed rulemaking "adequate to afford interested parties a reasonable opportunity to participate in the rulemaking process." MCI v. FCC, 57 F.3d 1136, 1140 (D.C.Cir. 1995), quoting Florida Power & Light Co. v. United States, 846 F.2d 765, 771 (D.C.Cir. 1988). Accord, Reeder v. FCC, 865 F.2d 1298 (D.C.Cir. 1989).

It is true that the subject-matter of this proceeding was described to include a new system of regulating extensions of construction permits. There is a doctrine which holds that public notice is adequate where "the content of the agency's final rule is a 'logical outgrowth' of its

rulemaking proposal." Aeronautical Radio, Inc. v. FCC, 928 F.2d 428 , 445-446 (D.C.Cir. 1991), citing United Steelworkers of America v. Marshall, 647 F.2d 1189, 1221 (D.C.Circ. 1981). However, the final rule in this case cannot be deemed a "logical outgrowth" of the proceeding when the Commission had explicitly announced its conclusion in the NPRM that to apply the new rule to older permits would be "administratively unworkable." The Commission cannot reasonably expect the public to guess that it would reject a conclusion expressly announced in the NPRM. If the Commission had questions or doubts concerning the application of the new three-year permit rule to older permits, it should have so indicated. With the express statement that the Commission had reached a conclusion, affected permittees were lulled to believe that the proposal did not pertain to them. Such machinations by the FCC are antithetical to the clear public notice requirements of the APA and associated case law.

Application of the new rule as announced in the R&O would be unfair and disastrous for Browne. Browne has sought and received several extensions of the construction permit for K34DU. The Commission found justification in granting each of these extension applications. However, none of the circumstances which gave rise to these extensions would qualify as a tolling encumbrance under the new rule. Consequently, the K34DU permit has already exhausted the newly defined allotment of three encumbrance-free years.

Innocently unaware of this looming change in the rules, Browne has continued to pursue the development if K34DU to the extent possible under difficult conditions. For a substantial period of time, the tower at the station's authorized antenna site was unavailable and Browne was precluded from filing an application to propose another site. When that problem was overcome, the station became displaced by a full-power station on the same channel. Browne has diligently

attempted to resolve each of these obstacles as they arose. Browne continues at the present time to prosecute its modification application seeking a new channel.

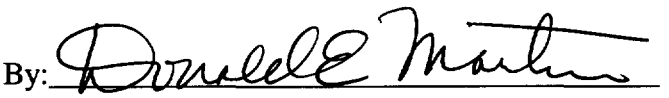
If the new rule were to be strictly and literally applied to K34DU, no further time for construction would be permissible, Browne's pending application to change channels would be moot, and the construction permit for K34DU would be forfeited. Browne's expensive and diligent effort to develop K34DU would be unceremoniously terminated. The conclusion stated by the Commission in the NPRM that application of the new rule to older permits already past their original construction term would be "administratively unworkable" is certainly correct, at least as it concerns Browne and K34DU. It is "unworkable" because it is unfair to Browne, who has labored in good faith to bring about a new low power television broadcast service for the Spokane community under difficult circumstances. It is "unworkable" because there apparently is no viable compromise between the strictures of the new rule and the legitimate needs of a permittee such as Browne whose plans and expectations were reasonably centered around the requirements of the old regulatory policies. The distress resulting from this "unworkable" situation is compounded by the lack of proper notice concerning the prospective change in the rule due to the Commission's failure to provide that notice.

Browne has been victimized by various other rules and policies of the Commission, such as restrictions on the filing of major change applications by LPTV stations, and the grant of a full-service construction permit on its channel. Browne has endured and survived those regulatory tribulations -- at considerable expense. It is now completely inequitable for the Commission to adopt a policy which will result is the extinction of Browne's station.

For the foregoing reasons, Browne respectfully urges the Commission to reconsider certain aspects of ¶89 of the R&O. Specifically, Browne asks the Commission to reverse its decision to apply the new three-year construction permit rule to existing construction permits which are no longer in the initial construction period. Instead, as to that class of permits, the Commission should reinstate the old rule and policies concerning the life and extension of construction permits which were in effect prior to the adoption of the R&O.

Respectfully submitted,

BROWNE MOUNTAIN TELEVISION

By: 
Donald E. Martin

DONALD E. MARTIN, P.C.
6060 Hardwick Place
Falls Church, Virginia 22041
(703) 671-8887

Its Attorney

January 19, 1999